Loh Siew Hong v Nazirah Nanthakumar bt Abdullah & Anor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-44–28–02 OF 2022
COLLIN LAWRENCE SEQUERAH J
18 MARCH 2022

Criminal Procedure — Habeas corpus — Application for — Court ordered sole custody, care, and control of children to mother of children — Social Welfare Department unlawfully detained children despite court order — Whether the attempt to prevent reunification between mother and children was done mala fide — Whether court had power and jurisdiction of the court to hear the application for habeas corpus — Courts of Judicature Act 1964 — Specific Relief Act 1950 Part 2, Chapter VIII

This was an application for a writ of habeas corpus to issue an order that the applicant's children ('the three children') be released from the personal custody of the first respondent and/or Jabatan Kebajikan Masyarakat Perlis (the second respondent) and be returned to the custody of the applicant. The applicant was married to one Nagahswaran, the biological father of the three children who unilaterally converted the three children to the Islamic religion. Although the court had previously ordered that the sole custody, care and control of the said children be given to the applicant, the applicant averred that the first respondent had prevented her from meeting and taking her children into her care and custody. The applicant had also gone to the Asrama Lelaki Tahfiz al-Hambra at Kepala Batas, Penang after having been informed that her children were there but was told that her children were relocated elsewhere. As a result of this, the applicant lodged a police report. Subsequently, the applicant was informed by the first respondent that the three children were in Perlis. The applicant averred that her children in Perlis were placed under the custody and care of the first respondent and/or the second respondent. The issues that arose for determination were: (a) whether the first respondent had been made aware of any order issued by the High Court regarding custody, care and control of the children, which the first respondent was not a party to the action; (b) whether the applicant's application was rendered as the first respondent had no longer had care or custody of the children; (c) whether the continued detention of the children was lawful; and (d) whether the court had power and jurisdiction of the court to hear an application for habeas corpus.

Held, allowing the application:

(1) The first respondent affirmed her affidavit in reply that she had no knowledge of any court order in respect of the sole custody, care and

control of the children. However, the exchange of *Whatsapp* communication between the first respondent and the applicant showed the applicant had forwarded a copy of the court order to the first respondent. Although the orders were not visible in full and not crystal clear to the eye, it nonetheless showed that a PDF version of two sealed copies of court orders was forwarded to the first respondent. There was also a preceding message from the applicant to the first respondent which was a plea from the applicant asking why the first respondent was refusing to hand over the children to the applicant. Thus, it was clear that the first respondent had notice of the court order granting the applicant sole custody, care and control of the three children (see paras 39–40 & 42–44).

(2) According to the affidavit in reply to the first respondent, the children were handed over to the care of the Jabatan Kebajikan Negeri Perlis on 14 February 2022, albeit allegedly with the consent of the applicant. This fact notwithstanding, the present application was filed by the applicant on 13 February 2022 which meant that at the time of filing, the children were still in the custody, care and control of the first respondent. Applying the latest decision of *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203, the present application was not rendered academic as far as the first respondent was concerned. Whereas, as far as the second respondent was concerned, the children were present in the care and custody of the Jabatan Kebajikan (see paras 70–73).

(3) When it comes to the religious upbringing of children, the consent of both parents was required, thus ruling out unilateral conversion (*Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545). Since there was no evidence that the applicant had so consented in this case, the unilateral conversion of the children by Nagashwaran was, therefore, unlawful. The contention of the first respondent that there was no issue of unilateral conversion as the children were converted before the decree nisi did not alter the fact that this was a case of unilateral conversion. Hence, the refusal to hand over the children to the applicant and the relocation of the children was inextricably intertwined with the unilateral conversion of the children by Nagashwaran which led to the filing of this application. The resulting attempt to prevent the reunification between mother and children smack, nay, reeks of mala fide (see paras 78–82).

(4) At the time this case was heard, the children are 14 years old and 11 years old respectively and, therefore, are all defined as a 'child' under the Child Act 2001 (see para 89).

(5) The applicant had previously obtained an interim ex parte order granting her sole custody, care and control of the three children. These court

orders were still in force and not set aside or reversed. It was the applicant who ought to have the sole custody, care and control of the three children, all of them being minors at the time of hearing. The relevant court order contained a clause directing the police to do all things necessary to ensure compliance with the said order, further emphasising its peremptory nature. The fact that matters had to come to reach this stage served only to portray the lackadaisical, brazen and contemptuous behaviour of the parties responsible for keeping the children from rightfully reuniting with the applicant. In the premises, the application for the writ of habeas corpus to be issued as per encl 1 of the notice of motion was allowed and the children were to be released forthwith into the sole custody, care and control of the applicant (see paras 93–94 & 96–99).

[Bahasa Malaysia summary

Ini adalah permohonan writ habeas corpus untuk perintah bahawa anak-anak pemohon ('tiga anak tersebut') dibebaskan daripada jagaan peribadi responden pertama dan/atau Jabatan Kebajikan Masyarakat Perlis (responden kedua) dan dikembalikan kepada pemohon. Pemohon telah berkahwin dengan Nagahswaran, bapa kandung kepada tiga orang anak yang secara satu pihak ('unilateral') menukar agama tiga anak tersebut kepada agama Islam. Walaupun mahkamah sebelum ini memerintahkan supaya hak jagaan, penjagaan dan kawalan terhadap tiga anak tersebut diberikan kepada pemohon, pemohon mendakwa responden pertama telah menghalangnya daripada bertemu dan membawa anak-anaknya ke dalam jagaannya. Pemohon juga telah pergi ke Asrama Lelaki Tahfiz al-Hambra di Kepala Batas, Pulau Pinang selepas dimaklumkan bahawa anak-anaknya berada di sana tetapi diberitahu bahawa anak-anaknya telah dipindahkan ke tempat lain. Akibat daripada itu, pemohon telah membuat laporan polis. Selepas itu, pemohon dimaklumkan oleh responden pertama bahawa tiga anak tersebut berada di Perlis. Pemohon menyatakan bahawa anak-anaknya di Perlis diletakkan di bawah jagaan dan penjagaan responden pertama dan/atau responden kedua. Isu-isu yang timbul untuk penentuan adalah: (a) sama ada responden pertama telah dimaklumkan tentang sebarang perintah yang dikeluarkan oleh Mahkamah Tinggi mengenai jagaan, penjagaan dan kawalan tiga anak tersebut, yang mana responden pertama bukanlah pihak di dalam tindakan itu; (b) sama ada permohonan itu dibuat kerana responden pertama tidak lagi mempunyai hak penjagaan tiga anak tersebut; (c) sama ada penahanan berterusan tiga anak tersebut adalah sah; dan (d) sama ada mahkamah mempunyai kuasa untuk mendengar permohonan habeas corpus.

Diputuskan, membenarkan permohonan:

(1) Responden pertama telah menyatakan di dalam afidavit balasannya bahawa beliau tidak mengetahui sebarang perintah mahkamah berkenaan dengan hak jagaan, penjagaan dan kawalan tiga anak tersebut.

Bagaimanapun, komunikasi *Whatsapp* antara responden pertama dan pemohon menunjukkan pemohon telah mengemukakan salinan perintah mahkamah kepada responden pertama. Walaupun perintah itu tidak dapat dilihat sepenuhnya dan tidak jelas, dua salinan perintah mahkamah yang dimeterai dalam bentuk PDF telah dihantar kepada responden pertama. Terdapat juga mesej terdahulu daripada pemohon kepada responden pertama menunjukkan pemohon bertanya mengapa responden pertama enggan menyerahkan tiga anak tersebut kepada pemohon. Oleh itu, adalah jelas bahawa responden pertama mengambil maklum terdapat notis perintah mahkamah yang memberikan hak jagaan, penjagaan dan kawalan kepada pemohon (lihat perenggan 39–40 & 42–44).

(2) Menurut afidavit balasan responden pertama, tiga anak tersebut diserahkan untuk jagaan Jabatan Kebajikan Masyarakat Negeri Perlis pada 14 Februari 2022, walaupun didakwa telah mendapat persetujuan pemohon. Permohonan ini telah difailkan oleh pemohon pada 13 Februari 2022, bermaksud pada masa pemfailan, tiga anak tersebut masih dalam jagaan, penjagaan dan kawalan responden pertama. Dengan mengguna pakai keputusan terbaru *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203, permohonan ini tidak akademik untuk responden pertama. Manakala, bagi responden kedua, tiga anak tersebut berada di dalam jagaan Jabatan Kebajikan Masyarakat (lihat perenggan 70–73).

(3) Apabila menyentuh soal didikan agama anak-anak, persetujuan kedua-dua ibu bapa diperlukan dan penukaran unilateral adalah tidak dibenarkan (*Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545). Oleh kerana tiada bukti bahawa pemohon telah bersetuju dalam kes ini, penukaran unilateral tiga anak tersebut oleh Nagashwaran adalah menyalahi undang-undang. Hujahan responden pertama bahawa tidak timbul isu penukaran unilateral kerana tiga anak tersebut ditukarkan agama sebelum dekri nisi tidak mengubah hakikat bahawa ini adalah kes penukaran agama secara unilateral. Oleh itu, keengganan untuk menyerahkan tiga anak tersebut kepada pemohon dan tindakan memindahkan tiga anak tersebut merupakan satu penukaran unilateral oleh Nagashwaran yang membawa kepada pemfailan permohonan ini. Tindakan tersebut adalah untuk mengelakkan ibu dan tiga anak tersebut berjumpa dan merupakan satu tindakan mala fide (lihat perenggan 78–82).

(4) Pada masa kes ini dibicarakan, kanak-kanak itu masing-masing berumur 14 tahun dan 11 tahun dan oleh itu, kesemuanya ditakrifkan sebagai 'kanak-kanak' di bawah Akta Kanak-Kanak 2001 (lihat perenggan 89).

(5) Pemohon sebelum ini memperoleh perintah ex parte interim yang

memberikan hak jagaan, penjagaan dan kawalan terhadap tiga anak tersebut. Perintah mahkamah ini masih berkuat kuasa dan tidak diketepikan atau dikembalikan. Pemohon mempunyai hak jagaan, penjagaan dan kawalan tunggal terhadap tiga anak tersebut yang mana semuanya adalah kanak-kanak di bawah umur pada masa pendengaran tersebut. Perintah mahkamah yang berkaitan mengandungi klausa yang mengarahkan polis untuk melakukan semua perkara yang perlu untuk memastikan pematuhan terhadap perintah tersebut. Perkara yang sampai kepada tindakan ini telah menggambarkan perkara yang tidak baik, tidak berperikemanusiaan dan menghina mahkamah kerana pihak-pihak yang bertanggungjawab gagal melaksanakan perintah untuk mengembalikan tiga anak tersebut kepada pemohon. Oleh itu, permohonan writ habeas corpus dikeluarkan menurut lampiran 1 notis usul dibenarkan dan tiga anak tersebut dibebaskan dengan serta-merta untuk jagaan dan dibawah kawalan pemohon (lihat perenggan 93–94 & 96–99).]

Cases referred to

Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors [2020] 1 MLJ 351; [2020] 1 AMR 1; [2020] 1 CLJ 747, FC (refd)

Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors [2021] 5 MLJ 474, FC (refd)

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)

Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841, FC (refd)

Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals [2022] 3 MLJ 203; [2022] 3 CLJ 177, FC (folld)

Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321, FC (refd)

Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors [2006] 1 MLJ 309, FC (refd)

Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759, FC (folld)

Legislation referred to

Courts of Judicature Act 1964 s 25
Criminal Procedure Code s 365
Dangerous Drugs (Special Preventive Measures) Act 1985
Federal Constitution art 5(2)
Prevention of Crime Act 1959 s 4(1)(a)
Rules of Court 2012 O 53
Specific Relief Act 1950 Part 2, Chapter VIII

Shamsher Singh Thind (with Srimurugan and Gunamalar Joorindanjin) (SS Thind) for the applicant.

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SK Sundram watching brief for the Pertubuhan Hindu Dharma Malaysia.
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M Rezza Hassan (with Hamizan Sobree) watching brief for the Majlis Agama Islam, Perlis.
Rajesh Nagarajan watching brief for the Malaysia Hindu Sangam.

Collin Lawrence Sequerah J:

INTRODUCTION

[1] This is an application for a writ of habeas corpus to issue to order that the three children respectively be released from the personal custody of the first respondent and/or the second respondent and be returned to the custody of the applicant.

[2] The second respondent, who I was made to understand, was the Jabatan Kebajikan Masyarakat Perlis, was not represented.

BACKGROUND

[3] The background facts that led to the filing of this application is best appreciated by outlining the respective narratives of the applicant and the first respondent.

Applicant's narrative

[4] The three children are the biological children of the applicant. The applicant was married to Nagahswaran a/l Muniandy (Nagahswaran) who is the biological father of the said children.

[5] On 31 March 2021, the Family Division of the Kuala Lumpur High Court (KLHC) ordered that the sole custody, care and control of the said children be given to the applicant.

[6] According to the applicant, she came to know that her children were in the custody of the first respondent at the Hidayah Centre Foundation in Bayan Lepas, Penang.

[7] The applicant averred that the first respondent had prevented her from meeting and taking her children into her care and custody.

[8] On 11 February 2022, at around 4pm, the applicant said she went to the Asrama Lelaki Tahfiz al-Hambra at No 1862 Lorong Seri Gelugor, 13100, Kepala Batas, Penang after having been informed that her children were there only to be told that her children were re-located elsewhere.

[9] As a result of this, the applicant on 12 February 2022 lodged a police report, Balai Polis Tasek Gelugor in Butterworth, Penang.

[10] Subsequent to this, the first respondent got in touch with the applicant and informed her that her children were now in Perlis.

[11] The applicant averred that her children in Perlis were placed under the custody and care of the first respondent and/or the second respondent who at the material time of the hearing of this application, was the Jabatan Kebajikan Masyarakat Perlis.

The narrative of the first respondent

[12] The first respondent annexed in her affidavit in reply, a chronology of events in respect of her meetings with the said children.

[13] The chronology also gives an account of Nagahswaran's journey to the Islamic faith which involved a fortuitous meeting between Nagahswaran and an old acquaintance of his by the name of Abdul Khadir at a hospital when Nagahswaran went to collect medication for his children due to Nagahswaran's involvement in a motorcycle accident with his children.

[14] According to the first respondent, it was at this meeting that Nagahswaran communicated his desire and interest in embracing the Islamic faith to Abdul Khadir.

[15] This meeting between the two men resulted in both of them along with the said children in tow going to the Pejabat Agama Islam Perlis on 7 July 2020 where Nagahswaran and the three children converted to the Islamic faith.

[16] The first respondent then stated that Abdul Khadir contacted her and requested for her help in providing motivation and an understanding of Islam to Nagahswaran and the three children.

[17] According to the first respondent, she advised Abdul Khadir to pay attention to the children's schooling needs and to assist Nagahswaran in registering for religious courses with a view to understanding the religion.

[18] The first respondent further stated that a person known as Brother Ben arranged for the schooling of the three children. She also stated that she had got the permission of Nagahswaran to send the children to school as well as arranged for their welfare.

[19] A perusal of the annexures to the affidavit of the first respondent, namely, 'NNA-2(a)', 'NNA-2(b)' and 'NNA-2(c)', show that these are religious schools known as Sekolah Menengah Al-lslah, Sungai Petani, Kedah, Madrasah Al-Quran Wal Arabiyyah (Mawar), Kepala Batas, Penang and Pusat Pendidikan Al-Ikram, Tasek Gelugor, Penang respectively.

[20] The first respondent stated that she communicated with the applicant initially through *Facebook Messenger* and later through *Whatsapp* and that the understanding between them from the beginning was that the children would be reunited with the applicant.

[21] The first respondent therefore, asserted that the allegation widely disseminated through the media levelled against her by the applicant that she was hiding the children were unfounded.

[22] She lodged a police report regarding this. She also claimed that the children were handed over to the Jabatan Kebajikan Masyarakat Perlis on 14 February 2022 with the agreement of the applicant. Since that date, the said children were no longer in her care and custody.

[23] The first respondent also claimed that she had never been made aware of any order issued by the KLHC regarding custody, care and control of the children as she was not a party to the action.

[24] The first respondent stated that all matters regarding embracing the Islamic religion on the part of the children were carried out by Nagahswaran and her only role was in providing information concerning the related institutions or agencies.

[25] The first respondent finally stated that the application against her was rendered academic as she no longer had care or custody of the children.

THE REMEDY OF HABEAS CORPUS

[26] The original manner in which the writ of habeas corpus was described was *habeas corpus ad subjiciendum* a Latin term meaning 'that you have the body to submit to'.

[27] The exact historical origins of the writ are shrouded in the mists of antiquity, some quarters holding the belief that it had its foundations in the Magna Carta.

[28] The Magna Carta was a Charter signed by King John of England in 1215 after having been confronted by the barons at Runnymede, which amongst other things, entrenched a subject right to be free from arbitrary imprisonment or seizure of his rights or possessions except by the lawful judgement of his equals or by the law of the land.

[29] More recent literature, however, holds the view that the modern form of the writ did not in fact owe its existence to the Magna Carta.

[30] This notwithstanding, what is clear now is that the writ is understood as being a remedy for a person unlawfully detained by the authorities.

[31] The court's power and jurisdiction in this country to entertain applications for habeas corpus emanates from the inherent powers granted to the superior courts under the Schedule to the Courts of Judicature Act 1964 (Act 91) and the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950 (Act 137).

[32] The relevant procedure relating to judicial review is governed by O 53 of the Rules of Court 2012.

[33] The Federal Court speaking through Zawawi Salleh FCJ in *Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors* [2020] 1 MLJ 351; [2020] 1 AMR 1; [2020] 1 CLJ 747 provides a concise and clear explanation of the nature of the remedy as follows:

> ... The term habeas corpus refers most commonly to a specific writ known in full as 'habeas corpus ad subjiciendum', a prerogative writ ordering that a prisoner be brought to the court so that it can be determined whether or not the prisoner is being imprisoned lawfully. Put simply, a writ of habeas corpus is a challenge to the legality of a prisoner's detention. The words 'habeas corpus' is a Latin law term. Its literal English translation is: 'you have the body'.
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> The writ of habeas corpus, described by Blackstone as the 'great and efficacious writ, in all manner of illegal confinement' (see: *William Blackstone's Commentaries on the Law of England* (1st Ed, 1765, Vol 3) at p 131), functions as a judicial remedy aimed at preventing the arbitrary use of Executive power to imprison individuals unlawfully. The use of habeas corpus has roots in English common law dating back to the fourteenth century. It was first expressed in the Magna Carta of 1215, which stated, 'No free man shall be seized, or imprisoned, or disseized, or outlawed, or exiled, or injured in any way, nor we will enter on him or send against him except by the lawful judgment of his peers, or by the law of the land'.

[34] Although commonly resorted to in this country as a remedy for those detained under the law relating to preventive detention such as the Prevention of Crime Act 1959 and the Dangerous Drugs (Special Preventive Measures) Act 1985, the application for the writ to issue is no less relevant and applicable here as what is alleged by the applicant is the unlawful detention of her three children by the First and second respondent.

ANALYSIS AND DECISION

[35] This case had generated much public interest, mainly due to the contention that the applicant's three children were unilaterally converted to the Islamic religion by their biological father.

[36] This fact was further evidenced by the presence of learned counsels holding a watching brief for the Malaysian Bar Council (Majlis Peguam Malaysia), Malaysia Hindu Sangam, Pertubuhan Hindu Dharma Malaysia, Malaysian Hindu Lawyers Association and the Majlis Agama Islam Perlis respectively.

[37] The case for the applicant portrayed the picture of a beleaguered mother separated from her children and being given the run around by persons or entities having custody, care of control of the children in her desperate attempt to meet up with and eventually reconcile with them.

[38] Notwithstanding all of this, it must not be lost sight of the fact that the current application is focused only in respect of whether the continued detention of the children by all or any of the parties concerned, is lawful or not.

Did the first respondent have knowledge of the court orders granting sole custody, car and control of the children to the applicant?

[39] The first respondent affirmed her affidavit in reply on 20 February 2022 where she asserted that she had no knowledge of any court order in respect of the sole custody, care and control of the children.

[40] However, the exchange of *Whatsapp* communication between the first respondent and the applicant exhibited as P3 in the applicant's affidavit affirmed on 13 February 2022 show that on 21 January 2022, the applicant had forwarded a copy of the court order to the first respondent.

[41] In this regard there are two court orders issued on 31 March 2021 and an earlier interim ex parte order from the same court dated 20 December 2019 granting sole custody, care and control of the children to the applicant.

[42] Although the orders in P3 are not visible in full and not crystal clear to the eye, it nonetheless shows that a PDF version of two sealed copies of court orders were forwarded to the first respondent.

[43] The immediately preceding message from the applicant to the first respondent reads 'Why u don't want serah my children?' which quite obviously is a plea from the applicant asking why the first respondent is refusing to hand over the children to her.

[44] It is thus clear that the first respondent had notice of the court order granting sole custody, care and control of the three children to the applicant.

Is the application academic as far as the first respondent is concerned?

[45] Learned counsel for the first respondent also raised the contention that because the children were not in her custody at the time this application was filed, it was rendered academic as far as she was concerned.

[46] The case of *Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors* [2021] 5 MLJ 474 was cited in support.

[47] That decision overruled the Federal Court decision in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 while reaffirming the decision of the Federal Court in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309 and *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841 which held that an application for a writ of habeas corpus had to be directed towards the current detention order.

[48] However, the latest decision from the apex court has signaled a paradigm shift away from the position as expressed in *Goh Leong Yong*.

[49] In the Federal Court case of *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203; [2022] 3 CLJ 177 Criminal Appeal Nos 05(HC)-38–03 of 2021(W), 05(HC)-41–03 of 2021(W), 05(HC)-43–03 of 2021(W), 05(HC)-42–03 of 2021(W), 05(HC)-44–03 of 2021(W), 05(HC)-45–03 of 2021(W), 05(HC)-106–06 of 2021(W), 05(HC)-107–06 of 2021(W), 05(HC)-108–06 of 2021(W), 05(HC)-109–06 of 2021(W), 05(HC)-110–06 of 2021(W), 05(HC)-111–06 of 2021(W), 05(HC)-112–06 of 2021(W), 05(HC)-113–06 of 2021(W), 05(HC)-114–06 of 2021(W), 05(HC)-115–06 of 2021(W), 05(HC)-116–06 of 2021(W), 05(HC)-117–06 of 2021(W), 05(HC)-118–06 of 2021(W), 05(HC)-119–06 of 2021(W), 05(HC)-120–06 of 2021(W), 05(HC)-121–06 of 2021(W), 05(HC)-122–06 of 2021(W), 05(HC)-123–06 of 2021(W) and 05(HC)-124–06 of 2021(W), the apex court heard a series of cumulative

A appeals relating to preventive detention under the Prevention of Crimes Ordinance 1959 ('the POCA') brought by all the appellants, who were detainees at the time of the filing of their applications for habeas corpus and other declaratory relief.

B **[50]** At the time of hearing the appeals, the periods of detention had since expired, although all the appellants were in detention at the time of the disposal of their appeals before the High Court.

C **[51]** The first set of appeals dealt with six cases, while the second set of appeals dealt with 19 cases.

[52] In both sets of appeals, the appellants were detained under POCA in relation to 'the organization and implementation of online gambling' which D was stated to be in contravention of the provisions of POCA.

[53] The main ground of challenge in both sets of appeals were similar, namely that online gambling does not fall within the scope of POCA and secondly that POCA does not apply to foreign nationals.

E

[54] In the first set of six appeals, the additional issue of the applications being academic, as the relevant period of remand and detention under s 4(1)(a) of the POCA having expired, was also raised.

F

[55] With regard to the nineteen appeals, the issue was whether the appeals against the order of the High Court judge was academic at the point in time when it was heard on appeal because the period of detention of six months had lapsed.

G

[56] The leading judgment in the Federal Court in all these appeals was delivered by Nallini Pathmanathan FCJ who in an illuminating analysis held that the remedy of habeas corpus is predicated on art 5(2) of the Federal Constitution which reads:

H

Article 5

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

I (2) Where complaint is made to a High court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

[57] The Federal Court said that although the jurisdiction to issue the remedy of habeas corpus or release is conferred by the additional powers of the High Court specified in Schedule 1, s 25 of the Courts of Judicature Act 1964 ('the CJA') and s 365 of the Criminal Procedure Code, it is art 5(2) of the Federal Constitution that confers the foundational constitutional jurisdiction of review and remedy, namely the entitlement to review the legality of the detention and the remedy of release.

[58] The Federal Court also stated that the English common law remedy of habeas corpus should not be invoked in support of an application for release from such detention, as we in this country have art 5(2) and the CJA.

[59] The underlying rationale for adopting this position was expressed as follows:

> [84] If indeed the remedy afforded art 5(2) of the FC is refused on the basis that the detention order pursuant to which the application was made, has been replaced with some other detention order, or that the detainee has since been discharged, the scheme of Part II of the FC, more particularly art 5(2) of the FC, would be frustrated, as a person could be detained for a length of time unlawfully, and released just prior to the hearing of his application for habeas corpus, notwithstanding that he filed it during the period that he was detained, as explained earlier on.

[60] The Federal Court then went on to state the proper construction to be afforded to art 5(2) in the context of a detention under the POCA as follows:

> [87] The full and proper construction to be afforded to art 5(2) of the FC is that the court looks at the application as if it were a s 4(1) of the POCA detention, and if such detention is tainted, then it follows that any other detention ensuing from it, must be similarly tainted, because they both stem from the same series of transactions under the same legislation, namely POCA.
>
> The fact that the initial remand and detention was tainted, cannot be ignored or swept under the carpet, allowing for continued detention under separate but related provisions of POCA.

[61] The Federal Court then went on to state the summary of their findings with regard to whether the appeals were academic or not as follows:

> [136] We rejected these arguments and in so doing, reaffirmed *Zaidi bin Kanapiah* as representing the correct view on the subject. Without narrowing what has been reasoned at length above, we summarise our legal findings as follows:
>
> (a) the High Court's constitutional duty to assess the legality of any detention — especially preventive detention — starts from the date of filing of the habeas corpus application assuming that the detainee was, at the time he filed it, under detention. In this assessment, the court must scrutinise the legality of the detention from the lens of the detenu;

(b) the jurisdiction of the High Court or a High Court judge is not determined by the fact of physical detention but the legality of the detention itself assessed from the date of the filing of the application for habeas corpus;

(c) viewed in this way and giving art 5(2) of the FC its fullest effect, the fact that the detenu was, subsequent to the date of the filing of his application, preventively detained by some other authority or under some other provision, legislation or order does not vitiate his right to judicial scrutiny over the legality of his initial detention;

(d) similarly, the fact that the detenu is released after the date the application is filed, but before the return or hearing date, does not affect the jurisdiction of the court to review the legality of the detention which is under challenge; and

(e) finally the fact that the detenu is under detention during the hearing but released after an appeal to the Federal Court is filed, does not render the application 'academic'. The live issue before the Federal Court is no longer simply the detention but the correctness of the decision of the High Court as assessed from the lens of the High Court judge.

[62] In respect of the decision in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759, the Federal Court had this to say:

> *The academic point in Zaidi bin Kanapiah*
>
> [60] In *Zaidi bin Kanapiah*, the Chief Justice Tengku Maimun binti Tuan Mat, whose judgement on this point represents the view of the Court as a whole, held conclusively that the case of Ezam represents the correct position in law and ought to be followed rather than Faizal bin Haris, *Rajanderan a/l Letchumanan v Timbalan Menteri dalam Negeri Malaysia & Ors* [2018] Supp MLJ 393 ('Rajanderan') and other cases such as *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841 ('Nasharuddin Nasir') and *Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 40. The Chief Justice went on to specifically hold that any other related decisions which departed from *Ezam* are no longer good law, and cannot be relied upon for the academic point raised by the respondents. This aspect of the decision is therefore binding on all lower courts in accordance with the doctrine of stare decisis.

[63] In doing so the Federal Court also made it abundantly clear that the case of *Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors* [2021] 5 MLJ 474 ought not to be followed.

[64] This court is of course bound by the latest pronouncement of the Federal Court in the above cited decision.

[65] Reverting to the case at hand, an examination of the averments in the affidavit in support of the applicant will show that on 11 February 2022, she went to the Asrama Lelaki Tahfiz al-Hambra at No 1862, Lorong Seri Gelugor 2, Taman Seri Gelugor, 13100, Kepala Batas, Penang after having being given to understand that her children were located there only to be told upon arrival that they had been taken elsewhere.

[66] The applicant consequently lodged a police report regarding this at the Tasek Gelugor Police Station at Butterworth, Tasek Gelugor/000425/22, exhibited as 'P4' in her affidavit in support.

[67] In P4, the applicant also stated that upon arrival at the said Asrama Lelaki Tahfiz al-Hambra, she was informed that her children were only relocated the previous day after which the applicant tried to call the first respondent at the mobile number 012–5503272 but there was no answer initially.

[68] The applicant stated that it was only after she went to the police station that she received a call from the first respondent asking her to come by herself to Perlis the next day ie 12 February 2022.

[69] Perusing the affidavit in reply of the first respondent, it will be seen that she had averred that the children were handed over to the care of the Jabatan Kebajikan Negeri Perlis on 14 February 2022, albeit allegedly with the consent of the applicant.

[70] This fact notwithstanding, the present application was filed by the applicant on 13 February 2022 which means that at the time of filing, the children were still in the custody, care and control of the first respondent.

[71] Applying the latest decision of the apex court cited above, the present application is not therefore rendered academic as far as the first respondent is concerned.

[72] As far as the second respondent is concerned, learned counsel for the applicant confirmed that the children were presently in the care and custody of the Jabatan Kebajikan or Welfare Department.

The unilateral conversion of the children

[73] Although the matter of the unilateral conversion of the children is not directly in issue in this application, it is best not to mimic Nelson at the Battle of Copenhagen (where the hero of Trafalgar put the telescope to his blind eye,

suffered during the siege at Calvi, and pretended not to see the signal ordering a withdrawal of the fleet) and ignore the fact that it is undoubtedly connected to the applicant's hitherto futile attempts to locate and reunite with her children, which eventually led to the filing of the present application.

[74] In legal parlance of the common law variety, the reference to Lord Nelson's actions above is referred to as 'willful blindness' while the Americans call it 'contrived ignorance'.

[75] The point must therefore be made that the issue regarding the unilateral conversion of the three children to the Islamic religion has been resoundingly settled by the decision of the apex court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, the facts of which are not dissimilar to the instant case.

[76] In *Indira Gandhi*, of the three questions of law referred to the Federal Court, only question No 3 is of relevance. So, as not to dilute the reasoning of the leading judgment by Zainun Ali FCJ on this point, it is best that it is set out verbatim hereunder as follows:

> Question 3
>
> [142] *The third question in these appeals reads as follows*:
>
> > *Whether the mother and the father (if both are still surviving) of a child of a civil marriage must consent before a Certificate of Conversion to Islam can be issued in respect of that child ?*
>
> ...
>
> [148] *The central contention in relation to this question involves around the interpretation of art 12(4) of the Federal Constitution. The English version of art 12(3) and (4) read as follows*:
>
> > Article 12(4) of the Federal Constitution
> >
> > 12 Right in respect of education
> >
> > (1) ...
> >
> > (2) ...
> >
> > (3) *No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.*
> >
> > (4) *For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.* (Emphasis added)
>
> [149] *The pertinent provision in the Eleventh Schedule, read together with art 160(1), provides that in interpreting the Constitution*:

Construction of singular or plural —

words in the singular include the plural, and words in the plural include to singular.

[150] *Applying the guide to interpretation to art 12(4), the position is fairly clear : the singular word 'parent' includes the plural 'parents'. The religion of the minor child is to be decided by his 'parent' or 'parents' as the case may be.*

[151] *However, the formulation in art 12(4) is differently worded in the national language translation of the Federal Constitution, which reads as follows:*

(4) Bagi maksud Fasal (3) agama seseorang yang di bawah umur lapan belas tahun hendaklah ditetapkan oleh *ibu atau bapanya* atau penjaganya. (Emphasis added)

[152] *The phrase 'ibu atau bapa' or 'his father or mother' denotes a parent in the singular, and appears to preclude an interpretation requiring the religion to be determined by both father and mother. In light of the apparent inconsistency between the Bahasa Malaysia and English version of art 12(4), it was contended that the former is authoritative and prevails over the latter pursuant to art 160B of the Constitution. Article 160B states:*

160B. Authoritative text Where this Constitution has been translated into the national language, the *Yang di-Pertuan Agong may prescribe such national language text to be authoritative,* and thereafter if there is any conflict or disagreeing between such national language text and the English language text of this Constitution, the national language text shall prevail over the English language text. (Emphasis added)

[153] *The High Court held that since the requisite prescription of the national language version under art 160B above has not been effected, the authoritative or official text is the English version.* The learned JC observed that the Senior Federal Counsel had not submitted otherwise. In the present appeals, despite the learned State Legal Adviser's reliance on art 160B, no evidence of the necessary prescription was adduced by either of the respondents. *In the circumstances, we will proceed on the basis that the English version to be authoritative.*

[154] *Much emphasis has been placed on the literal meaning of the singular noun 'parent' in art 12(4). The interpretive guide in the Eleventh Schedule aside, it must be recalled that the provisions of the Constitution are not to be interpreted literally or pedantically. The principles of constitutional interpretation were lucidly summarised by Raja Azlan Shah LP in Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 at p 32:

In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provision must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher* [1979] 3 All ER 21). A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily

A accepting the ordinary rules and presumptions of statutory interpretation. (Emphasis added.)

[155] *This is particularly so in respect of art 12(4), which falls under the fundamental liberties section in Part II of the Constitution. As was held in Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301:

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> *... The Constitution is a document sui generis governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights.* In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II.

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[163] *What can be discerned from the above is that, the law has come a long way from the days when one parent's claim could be considered superior to the other. Where the child's religion or religious upbringing is in issue, the paramount consideration for the court is to safeguard the welfare of the child, having regard to all the circumstances of the case.* In so doing the court does not pass judgment on the tenets of either parent's belief. Conversion to another religion is a momentous decision affecting the life of a child, imposing on him a new and different set of personal laws. *Where a decision of such significance as the conversion of a child is made, it is undoubtedly in the best interests of the child that the consent of both parents must be sought. The contrary approach of allowing the child to be converted on the consent of only one parent would give rise to practical conundrums.* The learned JC has described one such milieu at [35]):

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> If by 'parent' is meant either parent then we would have a situation where one day the converted parent converts the child to his religion and the next day the other parent realizing this would convert the child back to her religion. The same can then be repeated ad nauseam.

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[164] Such a scenario would undoubtedly be detrimental to the welfare of the child. Since a literal construction of art 12(4) would give rise to consequences which the legislative could not possibly have intended, the srticle should not be construed literally (*Sukma Darmawan* at p 247). *A purposive reading of srt 12(4) that promotes the welfare of the child and is consistent with good sense would require the consent of both parents (if both are living) for the conversion of a minor child.*

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[165] The need for such a reading is more starkly apparent in factual circumstances such as the present case. In *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234, Raja Azlan Shah FJ (as His Royal Highness then was), explained the considerations arising when custody has been given to one parent (at 240):

> Any solution to the problem presented here in which custody is given jointly to

both parents as suggested by the Appellant exhibits an error in the application of principle ...

In the present case I do not think such an order would be appropriate. The children and the father are living in different jurisdictions. Since the parent who has custody has control, he or she is put in a position to become the dominant influence, fixing the daily life style of the children. An absent and inactive parent, whatever his legal relationship to the children may be, cannot have such influence. He or she cannot do it by remote control.

In a situation such as the *present, when one parent has been given custody, and it is working well, it is a very wrong thing for this court to make an order which will interfere with the life style of the new family unit.* Of course, one sympathise with the father, but it is one of those things which he must face when the marriage breaks up.' (Emphasis added)

[166] In the present appeals, custody of the three children was granted to the appellant by the High Court. Having exhausted all avenues to challenge the custody order, the appellant's husband willfully disobeyed it and refused to hand over the youngest child, Prasana Diksa, to the appellant. He was found guilty of contempt in subsequent committal proceedings, and his appeal was struck out. A warrant of committal has been issued in respect of the husband. The Federal Court has held that having submitted to the jurisdiction of the civil court, it is not open for the husband to ignore the custody order issued by the civil court (see *Indira Gandhi a/p Mutho v Ketua Polis Negara* [2016] 3 MLJ 141 at [31]–[32]).

[167] *Since custody of the children has been granted to the appellant, it is the appellant who exercises the dominant influence in their lives. To allow the other spouse to unilaterally convert the children without the consent of the appellant would amount to a serious interference with the lifestyle of the new family unit which, following Teh Eng Kim, would be a 'very wrong thing'.* (Emphasis added.)

[77] It has been, therefore, authoritatively determined by the apex court that when it comes to the religious upbringing of children, the consent of both parents is required, thus ruling out unilateral conversion.

[78] Since there is no evidence that the applicant had so consented in this case, the unilateral conversion of the children by Nagashwaran is, therefore, unlawful.

[79] The contention of learned counsel for the first respondent that there was no issue of unilateral conversion as the children were converted before the decree nisi does not, as if by some miracle, alter the fact that this was a case of unilateral conversion.

[80] As alluded to earlier, the refusal to hand over the children to the applicant and the relocation of the children is inextricably intertwined with the unilateral conversion of the children by Nagashwaran which led to the filing of this application.

[81] The resulting attempt to prevent the reunification between mother and children smack, *nay, reeks of mala fide.*

[82] Having said this, the issue of the unilateral conversion of the children must be pursued before a different forum and not before this court.

The issue before this court

[83] As far as this court is concerned, it only behoves to consider whether the continued separation of the children from their mother, the applicant, by the actions of persons and/or entities responsible is lawful or not.

[84] This unhappy episode nonetheless had its genesis with must have been a happy union of marital bliss between the applicant and Nagahswaran a/l Muniandy.

[85] This union produced three lovely children.

[86] They must have enjoyed a carefree and playful formative years as all children are justly deserving off. However, as sometimes unhappily happens, the marital ship undergoes the turbulence and instability of stormy waters.

[87] This sometimes translates into the exchange of harsh words and in some cases, physical violence.

[88] When this happens, it is inevitably the poor children who are caught up in the cross-fire that ensues. And so, it was, and unhappily so, for these three children.

[89] At the time this case was heard, two of the children were 14 years old and 11 years old respectively and, therefore, are all defined as a 'child' under the Child Act 2001 (Act 611).

[90] The breakdown of the marriage between the applicant and Nagahswaran resulted in the battle lines being drawn between them which eventually manifested itself in the form of a Divorce Petition in the Family Division in the Kuala Lumpur High Court.

[91] The result of this was a court order issued on 31 March 2021 granting, inter alia, the applicant sole guardianship, custody, care and control of the three children while Nagahswaran was given supervised access with conditions.

[92] Prior to this, the applicant had obtained an interim ex parte order from the same court dated 20 December 2019 granting her sole custody, care and control of the three children.

[93] These court orders are still in force and not set aside or reversed. It is clear then as night follows the day, that it is the applicant who ought to have the sole custody, care and control of the three children, all of them being minors at the time of hearing.

[94] It is to be emphasised here that court orders are not to be treated with impunity upon pain of contempt.

[95] It is also worth making the point that the relevant court order issued by the KLHC Division of the Family Court contained a clause directing the police to do all things necessary to ensure compliance with the said order, further emphasising its peremptory nature.

[96] Given the above, the fact that matters have to come to reach this stage serves only to portray the lackadaisical, brazen and contemptuous behavior of the parties responsible for keeping the children from rightfully reuniting with the applicant.

[97] In the premises, I therefore, allow the application for the writ of habeas corpus to be issued as per encl 1 of the notice of motion.

[98] I order that the three children, are to be released forthwith into the sole custody, care and control of the applicant.

Application allowed.

Reported by K Selvaraju